

2022 Bill Draft: Prohibiting Abortion After Detection of Fetal Heartbeat

FOR AN ACT ENTITLED, An Act to prohibit abortion after a fetal heartbeat is detectable.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 34-23A-1 be amended:

34-23A-1. Definition of terms.

Terms used in this chapter mean:

- (1) "Abortion," the intentional termination of the life of a human being in the uterus;
- (1A) "Abortion facility," a place where abortions are performed;
- (1B) "Department," the South Dakota Department of Health;
- (2) "Fetus," the biological offspring, including the implanted embryo or unborn child, of human parents;
- (3) "Fertilization," that point in time when a male human sperm penetrates the zona pellucida of a female human ovum;
- (4) "Human being," an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation;
- (5) "Medical emergency," any condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function;
- (6) "Parent," one parent or guardian of the pregnant minor or the guardian or conservator of the pregnant woman;
- (7) "Physician," a person licensed under the provisions of chapter 36-4 or a physician practicing medicine or osteopathy in the employ of the government of the United States or of this state;

1 (8) "Probable gestational age of the unborn child," what, in the judgment of the
2 physician, will with reasonable probability be the gestational age of the unborn child
3 at the time the abortion is planned to be performed;

4 (9) "Unborn child," an individual organism of the species Homo sapiens from fertilization
5 until live birth; and

6 (10) "Woman" a person whose biological sex is female, including any person with XX
7 chromosomes and any person with a uterus, regardless of any gender identity that
8 the person attempts to assert or claim.

9 **Section 2. That chapter 34-23A be amended with a NEW SECTION:**

10 Terms as used in sections 2 to 21, inclusive, of this Act, mean:

11 (1) "Fetal heartbeat," cardiac activity or the steady and repetitive rhythmic contraction
12 of the fetal heart within the gestational sac;

13 (2) "Gestational age," the amount of time that has elapsed from the first day of a
14 woman's last menstrual period;

15 (3) "Gestational sac," the structure comprising the extraembryonic membranes that
16 envelop the unborn child and that is typically visible by ultrasound after the fourth
17 week of pregnancy;

18 (4) "Pregnancy," the human female reproductive condition that:

19 (a) Begins with fertilization;

20 (b) Occurs when the woman is carrying the developing human offspring; and

21 (c) Is calculated from the first day of the woman's last menstrual period; and

22 (5) "Standard medical practice," the degree of skill, care, and diligence that an
23 obstetrician of ordinary judgment, learning, and skill would employ in like
24 circumstances. This includes employing the appropriate means of detecting the
25 heartbeat based on the estimated gestational age of the unborn child and the
26 condition of the woman and her pregnancy for the purpose of determining the
27 presence of a fetal heartbeat.

28 **Section 3. That chapter 34-23A be amended with a NEW SECTION:**

1 Except as provided by sections 5 and 6 of this Act, an abortion may not be performed or
2 induced on a pregnant woman unless the physician has determined whether the woman's
3 unborn child has a detectable fetal heartbeat. In making the determination, the physician must
4 use a test that is:

5 (1) Consistent with the physician's good faith and reasonable understanding of
6 standard medical practice; and

7 (2) Appropriate for the estimated gestational age of the unborn child and the condition
8 of the pregnant woman and her pregnancy.

9 A physician making the determination shall record, in the pregnant woman's medical
10 record, the estimated gestational age of the unborn child, the method used to estimate the
11 gestational age, the test used for detecting a fetal heartbeat, and the date, time, and results of
12 the test.

13 **Section 4. That chapter 34-23A be amended with a NEW SECTION:**

14 Except as provided by sections 5 and 6 of this Act, a physician may not knowingly perform
15 or induce an abortion on a pregnant woman, if the physician detected a fetal heartbeat for the
16 unborn child as required by section 3 of this Act or failed to perform a test to detect a fetal
17 heartbeat.

18 A physician does not violate this section if the physician performed a test for a fetal
19 heartbeat as required by section 3 of this Act and did not detect a fetal heartbeat.

20 This section does not affect any other provision of state law that regulates or prohibits
21 abortion.

22 **Section 5. That chapter 34-23A be amended with a NEW SECTION:**

23 Sections 3 and 4 of this Act do not apply if a physician believes a medical emergency exists
24 that prevents compliance. A physician who performs or induces an abortion in this circumstance
25 shall make written notations in the pregnant woman's medical record of:

26 (1) The physician's belief that a medical emergency necessitated the abortion; and

1 (2) The medical condition of the pregnant woman that prevented compliance with sections
2 3 and 4 of this Act.

3 A physician performing or inducing an abortion under this section shall maintain in the
4 physician's practice records, a copy of the notations made under subsection (2).

5 **Section 6. That chapter 34-23A be amended with a NEW SECTION:**

6 Sections 3 and 4 of this Act do not apply to an abortion performed at the behest of federal
7 agencies, contractors, or employees that are carrying out duties under federal law, if a
8 prohibition on that abortion would violate the doctrines of preemption or intergovernmental
9 immunity.

10 **Section 7. That chapter 34-23A be amended with a NEW SECTION:**

11 Nothing in this chapter may be construed to:

12 (1) Create or recognize a right to abortion before a fetal heartbeat is detected;

13 (2) Authorize the initiation of a cause of action against or the prosecution of a woman on
14 whom an abortion is performed or induced or attempted to be performed or induced;

15 (3) Wholly or partly repeal, either expressly or by implication, any other statute that
16 regulates or prohibits abortion; or

17 (4) Restrict a political subdivision from regulating or prohibiting abortion in any manner.

18 **Section 8. That chapter 34-23A be amended with a NEW SECTION:**

19 Notwithstanding any other law, the requirements of sections 2 to 21, inclusive, of this Act
20 must be exclusively enforced exclusively through the private civil actions described in sections 9
21 to 17, inclusive, of this Act. No direct or indirect enforcement of sections 2 to 21, inclusive, of
22 this Act, may be taken or threatened by the state, a political subdivision, a state's attorney, or
23 any officer or employee of this state or a political subdivision, against any person, by any means
24 whatsoever, except as provided in sections 9 to 17, inclusive, of this Act, and no violation of
25 sections 2 to 21, inclusive, of this Act, may be used to justify or trigger the enforcement of any
26 other law or any type of adverse consequence under any other law, except as provided in sections

1 9 to 17, inclusive, of this Act, provided, that this section does not preclude enforcement of any
2 other law or regulation against conduct that is independently prohibited by such other law or
3 regulation.

4 **Section 9. That chapter 34-23A be amended with a NEW SECTION:**

5 Any person, other than the state, its political subdivisions, and any officer or employee of a
6 state or local governmental entity in this state, may bring a civil action against a person who:

- 7 (1) Performs or induces an abortion in violation of any provision or requirement of this
8 chapter;
9 (2) Knowingly engages in conduct that aids or abets the performance or inducement of
10 an abortion, including paying for or reimbursing the costs of an abortion through
11 insurance or otherwise, if the abortion is performed or induced in violation of any
12 provision or requirement of this chapter, regardless of whether the person knew or
13 should have known that the abortion would be performed or induced in violation of
14 this chapter; or
15 (3) Intends to engage in the conduct described by subdivisions (1) or (2).

16
17 **Section 10. That chapter 34-23A be amended with a NEW SECTION:**

18 If a claimant prevails in an action brought under section 9 of this Act, the court shall award:

- 19 (1) Injunctive relief sufficient to prevent the defendant from violating this chapter or
20 engaging in acts that aid or abet violations of this chapter;
21 (2) Statutory damages in an amount of not less than ten thousand dollars for each
22 abortion that the defendant performed, induced, or aided or abetted in violation of
23 this chapter;
24 (3) Nominal and compensatory damages if the plaintiff has suffered injury or harm from
25 the defendant's conduct, including but not limited to loss of consortium and
26 emotional distress; and
27 (4) Costs and attorneys' fees.

28

1 **Section 11. That chapter 34-23A be amended with a NEW SECTION:**

2 Notwithstanding section 10 of this Act, a court may not award relief under subdivisions (2)
3 and (4) of section 10 of this Act, in response to a violation of subdivision (1) or (2) of section 9 of
4 this Act, if the defendant demonstrates that the defendant previously paid or has been ordered
5 to pay the full amount of statutory damages under subdivision (2) of section 10 of this Act in a
6 previous action for that particular violation of this chapter, or for the particular conduct that
7 aided or abetted an abortion performed or induced in violation of this chapter.

8 Notwithstanding any other law, a person may bring an action under section 9 of this Act not
9 later than the sixth anniversary of the date the cause of action accrues.

10 Notwithstanding any other law, none of the following is a defense to an action brought under
11 section 9 of this Act:

- 12 (1) Ignorance or mistake of law;
- 13 (2) A defendant's belief that the requirements or provisions of this chapter are
14 unconstitutional or were unconstitutional;
- 15 (3) A defendant's reliance on any court decision that has been overruled on appeal or by
16 a subsequent court, even if that court decision had not been overruled when the
17 defendant violated section 9 of this Act;
- 18 (4) A defendant's reliance on any state or federal court decision that is not binding on the
19 court in which the action has been brought;
- 20 (5) Non-mutual issue preclusion or non-mutual claim preclusion;
- 21 (6) The consent of the unborn child's mother to the abortion; or
- 22 (7) Any claim that the enforcement of this chapter or the imposition of civil liability
23 against the defendant will violate the constitutional rights of third parties, except as
24 provided by section 18 of this Act.

25
26 **Section 12. That chapter 34-23A be amended with a NEW SECTION:**

27 It is an affirmative defense if a person sued under subdivisions (1) or (3) of section 9 of this
28 Act reasonably believed, after conducting a reasonable investigation, that the individuals and
29 organizations involved with performing or facilitating the abortion would comply with every

1 requirement and provision of this chapter. The defendant has the burden of proving the
2 affirmative defense by a preponderance of the evidence.

3
4 **Section 13. That chapter 34-23A be amended with a NEW SECTION:**

5 Section 9 to 17, inclusive, of this Act, may not be construed to impose liability on any speech
6 or conduct protected by the First Amendment of the United States Constitution, as made
7 applicable to the states through the United States Supreme Court's interpretation of the
8 Fourteenth Amendment of the United States Constitution, or S.D. Const., Art. VI, § 5.

9
10 **Section 14. That chapter 34-23A be amended with a NEW SECTION:**

11 Notwithstanding any other law, the state, any of its political subdivisions, any state's
12 attorney, any officer or employee of this state or a political subdivision may not:

- 13 (1) Act in concert or participation with anyone who brings suit under this section;
- 14 (2) Establish or attempt to establish any type of agency or fiduciary relationship with
15 a plaintiff who brings suit under this section;
- 16 (3) Make any attempt to control or influence a plaintiff's decision to bring suit under
17 this section or the plaintiff's conduct of the litigation; or
- 18 (4) Intervene in any action brought under this section.

19 Sections 9 to 17, inclusive, of this Act, do not prohibit a person or entity described by this
20 section from filing an amicus curiae brief in the action, so long as that person or entity does not
21 act in concert or participation with the plaintiff or plaintiffs who sue under this section or violate
22 any provision of subdivisions (1) through (4).

23
24 **Section 15. That chapter 34-23A be amended with a NEW SECTION:**

25 Notwithstanding any other law, a court may not award costs or attorneys' fees to a litigant
26 who is sued under this section.

27
28 **Section 16. That chapter 34-23A be amended with a NEW SECTION:**

1 Notwithstanding any other law, a civil action under this section shall not be subject to any
2 provision of § 1-1A-4.

3
4 **Section 17. That chapter 34-23A be amended with a NEW SECTION:**

5 Notwithstanding any other law, a civil action under this section may not be brought:

- 6 (1) Against the woman upon whom an abortion was performed or induced or
7 attempted to be performed or induced in violation of this chapter, or against a
8 pregnant woman who intends or seeks to abort her unborn child in violation of
9 this chapter;
- 10 (2) Against any person or entity that performs, aids or abets, or attempts to perform
11 or aid or abet an abortion at the behest of federal agencies, contractors, or
12 employees that are carrying out duties under federal law, if a prohibition on that
13 abortion would violate the doctrines of preemption or intergovernmental
14 immunity
- 15 (3) Against any common carrier that transports a pregnant woman to an abortion
16 provider, if the common carrier is unaware that the woman intends to abort her
17 unborn child; or
- 18 (4) By any person who impregnated a woman seeking an abortion through an act of
19 rape, sexual assault, or incest.

20 **Section 18. That chapter 34-23A be amended with a NEW SECTION:**

21 A defendant against whom an action is brought under sections 9 to 17, inclusive, of this Act,
22 may assert an affirmative defense to liability under this section if:

- 23 (1) The defendant has standing to assert the rights of a woman or group of women seeking
24 an abortion under the tests for third-party standing established by the Supreme Court of
25 the United States; and
- 26 (2) The imposition of civil liability on the defendant will result in an undue burden on a
27 woman or group of women seeking an abortion.

1 The defendant has the burden of proving the affirmative defense by a preponderance of the
2 evidence.

3 The affirmative defense is not available if the Supreme Court of the United States overrules
4 Roe v. Wade, 410 U.S. 113 (1973) or Planned Parenthood v. Casey, 505 U.S. 833 (1992), regardless
5 of whether the conduct on which the cause of action is based under sections 9 to 17, inclusive,
6 of this Act, occurred before the Supreme Court overruled either decision.

7 Nothing in this section or chapter shall limit or preclude a defendant from asserting the
8 defendant's personal constitutional rights as a defense to liability under sections 9 to 17,
9 inclusive, of this Act, and a court may not award relief under sections 9 to 17, inclusive, of this
10 Act, if the conduct for which the defendant has been sued was an exercise of state or federal
11 constitutional rights that personally belong to the defendant.

12 Nothing in this section or chapter shall limit or preclude a defendant from asserting the
13 unconstitutionality of any provision of this chapter or South Dakota law as a defense to liability
14 under sections 9 to 17, inclusive, of this Act.

15 **Section 19. That chapter 34-23A be amended with a NEW SECTION:**

16 Notwithstanding any other law, a civil action brought under sections 9 to 17, inclusive, of this
17 Act, shall be brought in:

- 18 (1) The county in which all or a substantial part of the events or omissions giving rise to the
19 claim occurred;
- 20 (2) The county of residence for any one of the natural person defendants at the time the
21 cause of action accrued;
- 22 (3) The county of the principal office in this state of any one of the defendants that is not a
23 natural person; or
- 24 (4) The county of residence for the claimant if the claimant is a natural person residing in this
25 state.

1 If a civil action is brought under sections 9 to 17, inclusive, of this Act, in any one of the venues
2 described herein, the action may not be transferred to a different venue without the written
3 consent of all parties.

4 **Section 20. That chapter 34-23A be amended with a NEW SECTION:**

5 Notwithstanding any other law, the state has sovereign immunity, each of its political
6 subdivisions has governmental immunity, and each officer and employee of this state or a
7 political subdivision has official immunity, as well as sovereign or governmental immunity, as
8 applicable, in any action, claim, counterclaim, or any type of legal or equitable action that
9 challenges the validity of any provision or application of this chapter, on constitutional grounds
10 or otherwise, or that seeks to prevent or enjoin the state, its political subdivisions, or any officer
11 or employee of this state or a political subdivision from enforcing any provision or application of
12 this chapter, unless that immunity has been abrogated or preempted by federal law in a manner
13 consistent with the Constitution of the United States.

14 Notwithstanding any other law, no provision of state law may be construed to waive or
15 abrogate an immunity described in this section, unless it expressly waives or abrogates immunity
16 with specific reference to this section.

17 Notwithstanding any other law, no attorney representing the state, its political subdivisions,
18 or any officer or employee of this state or a political subdivision is authorized or permitted to
19 waive an immunity described in this section or take any action that would result in a waiver of
20 that immunity.

21 Notwithstanding any other law, no court of this state has jurisdiction to consider any action,
22 claim, or counterclaim that seeks declaratory or injunctive relief to prevent the state, its political
23 subdivisions, any officer or employee of this state or a political subdivision, or any person from
24 enforcing any provision or application of this chapter, or from filing a civil action under this
25 chapter.

26 Nothing in this section or chapter may be construed to prevent a litigant from asserting the
27 invalidity or unconstitutionality of any provision or application of this chapter or South Dakota
28 law as a defense to any action, claim, or counterclaim brought against that litigant.

1 **Section 21. That chapter 34-23A be amended with a NEW SECTION:**

2 Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the
3 severability of a state statute regulating abortion the Supreme Court of the United States held
4 that an explicit statement of legislative intent is controlling, it is the intent of the legislature that
5 every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every
6 application of the provisions in this chapter to every person, group of persons, or circumstances,
7 are severable from each other.

8 If any application of any provision in this chapter to any person, group of persons, or
9 circumstances is found by a court to be invalid, preempted, unconstitutional, or to impose an
10 undue burden on any woman or group of women seeking an abortion, then the remaining
11 applications of that provision to all other persons and circumstances shall be severed and
12 preserved, and shall remain in effect. All constitutionally valid applications of the provisions in
13 this chapter, and every application of those provisions that can be enforced without imposing an
14 undue burden on women seeking abortions, shall be severed from any applications that a court
15 finds to be invalid, preempted, unconstitutional, or to impose an undue burden on women
16 seeking abortions, and the valid applications shall remain in force, because it is the legislature's
17 intent and priority that every valid application be allowed to stand alone. Even if a reviewing
18 court finds a provision of this chapter to impose an undue burden in a large or substantial fraction
19 of relevant cases, the applications that do not present an undue burden shall be severed from
20 the remaining applications and shall remain in force, and shall be treated as if the legislature had
21 enacted a statute limited to the persons, group of persons, or circumstances for which the
22 statute's application does not impose an undue burden.

23 The legislature further declares that it would have enacted this chapter, and each provision,
24 section, subsection, sentence, clause, phrase, word, and all constitutional applications of the
25 provisions of this chapter, irrespective of the fact that any provision, section, subsection,
26 sentence, clause, phrase, or word, or applications of this chapter were to be declared invalid,
27 preempted, unconstitutional, or to impose an undue burden.

1 If any provision of this chapter is found by any court to be unconstitutionally vague, then the
2 applications of that provision that do not present constitutional vagueness problems shall be
3 severed and remain in force, consistent with the severability requirements of this section.

4 No court may decline to enforce the severability requirements of this section on the ground
5 that severance would rewrite the statute or involve the court in legislative or lawmaking activity.

6 A court that declines to enforce or enjoins a state official from enforcing a statutory provision
7 does not rewrite a statute, as the statute continues to contain the same words as before the
8 court's decision. A judicial injunction or declaration of unconstitutionality:

9 (1) Is nothing more than an edict prohibiting enforcement that may subsequently be
10 vacated by a later court if that court has a different understanding of the
11 requirements of the South Dakota Constitution or United States Constitution;

12 (2) Is not a formal amendment of the language in a statute; and

13 (3) No more rewrites a statute than a decision by the executive not to enforce a duly
14 enacted statute in a limited and defined set of circumstances.

15 If any state or federal court disregards the severability requirements of this section and
16 declares or finds any provision of this chapter facially unconstitutional, when there are discrete
17 applications of that provision can be enforced against a person, group of persons, or
18 circumstances without violating federal law, the federal or state constitutions, or imposing an
19 undue burden on women seeking abortions, then that provision shall be interpreted, as a matter
20 of state law, as if the legislature had enacted a provision limited to the persons, group of persons,
21 or circumstances for which the provision's application will not violate federal law, the federal or
22 state constitutions, or impose an undue burden on women seeking abortions, and every court
23 shall adopt this saving construction of that provision until the court ruling that pronounced the
24 provision facially unconstitutional is vacated or overruled.